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Honorable Thomas S. Zilly

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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LEIF KIRCHOFF, individually and as Class representative,)))	No. 2-11-CV-00568 TSZ
Plaintiff,)))	MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIMS
v.)	
WIPRO, INC., and WIPRO, LTD, Delaware Corporations,)))	NOTE ON MOTION CALENDAR: September 14, 2012
Defendants.))	

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RELIEF REQUESTED

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Plaintiff Leif Kirchoff has sued defendants (Wipro), his former employer, claiming

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that Wipro violated the wage/hour laws by using an improper formula to prorate his salary for

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his first and last weeks of employment. Wipro can demonstrate that it used a formula

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consistent with the controlling federal and state regulations. Thus, Kirchoff fails to state a

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claim and has suffered no damage. The Court should, and it is requested to, enter summary

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judgment dismissing all of Kirchoff's claims.

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STANDARD OF REVIEW

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The court may grant summary judgment if no genuine dispute of material fact exists

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and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The

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moving party bears the burden of demonstrating the absence of a genuine issue of material

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fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 25, 48, 91 L. Ed. 2d 265 (1986).

A fact is material if it might affect the outcome of the suit under the governing law. *Anderson*

v. Liberty Lobby Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In

support of its motion for summary judgment, the moving party need not negate the opponent's

claim, *Celotex*, 477 U.S. at 323; rather, the moving party is entitled to judgment if the

evidence is not sufficient for a jury to return a verdict in favor of the opponent, *Anderson*, 477

U.S. at 249. To survive summary judgment, a non-moving party must "show through specific

evidence that a triable issue of fact remains on issues for which the non-movant bears the

burden of proof at trial." *Walker v. Shansky*, 28 F.3d 666, 670-71 (7th Cir. 1994), *aff'd sub*

nom. Walker v. Ghoudy, 51 F.3d 276 (7th Cir. 1995). *See also Celotex*, 477 U.S. at 324. The

adverse party must present affirmative evidence, which "is to be believed" and from which all

"justifiable inferences" are to be favorably drawn. *Id.* at 255, 257. When the record, taken as

a whole, could not lead a rational trier of fact to find for the non-moving party, summary

judgment is warranted. *See, e.g., Beard v. Banks*, 548 U.S. 521, 529, 126 S. Ct. 2572, 165 L.

Ed. 2d 697 (2006). *Bryant v. Wyeth*, 2012 WL 2951976 (W.D. Wash., July 19, 2012).

UNDISPUTED FACTS

Wipro's business operations in the U.S. include consulting with providing services to

various technology companies including Microsoft, Boeing, Cisco Systems, Honeywell,

AT&T, and many others. Complaint ¶ 8; Nagaraju Decl. ¶ 3. Wipro employed plaintiff Leif

Kirchoff as a highly- compensated Senior Manager, Supply Chain Management, for sixth

months from July 2010 to January 2011. Nagaraju Decl. ¶¶ 4, 5, and 9. Kirchoff's duties

involved managing the customer relationship at a large corporation including oversight,

business development, and quality assurance. *Id.* ¶ 4. Among other things, this involved

supervising staff and contractors at Microsoft. *Id.* His semi-monthly salary was $5,833.50,[1]

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[1] Semi-monthly pay is common for salaried employees. The employee gets paid twice per month (or 24 pay
periods per year). The first pay period each month is from the 1st to the 15th; the second pay period is from the
16th to the last day. The salary is the same for each pay period regardless of the number of workdays or calendar
days in the pay period, which will vary slightly from month to month. Semi-monthly pay should not be confused
with bi-weekly pay, which is a pay period of exactly two weeks (or 26 pay periods per year) with the identical

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1   which was paid to him in full each pay period except for his first pay period and his last pay

2   period when Wipro prorated his salary to account for the fact that Kirchoff only worked part

3   of those two pay periods. Nagaraju Decl., ¶¶ 5 and 9. Kirchoff does not dispute Wipro's

4   right to prorate his salary for the days that he did work during those two pay periods with no

5   pay for the days he did not work in each of the pay periods. Rather, he takes issue with

6   Wipro's formula for prorating. He claims that Wipro's formula violated both the federal Fair

7   Labor Standards Act (FLSA), 29 U.S.C. § 216(b), and the Washington Minimum Wage Act

8   (WMWA), RCW Chapter 49.46. He claims that he is owed an additional $41.30 for his first

9   pay period and an additional $73.14 for his last pay period.

10   **FEDERAL AND STATE RULES PERMIT PRORATED SALARY DEDUCTIONS**

11   Under federal and Washington law, employees who are paid on a "salary basis," like

12   Kirchoff, must receive a predetermined monetary amount each pay period. *See, e.g.*, 29

13   C.F.R. § 541.602(a); WAC 296-128-532(2). Here, Kirchoff was paid a predetermined

14   amount of $5,833.50 for each semi-monthly pay period.

15   Federal regulations provide, however, that, in certain circumstances, an employer may

16   deduct from the predetermined salary amount.[2] One of the exceptions is a deduction for days

17   not worked during an employee's first week or final week of employment.[3]

18   In making a deduction for the first or last week of employment, the federal regulations

19   allow for proportionality:

20   > An employer is not required to pay the full salary in the initial
          > or terminal week of employment. Rather, an employer may pay
21   > a ***proportionate part of an employee's full salary for the time
          > actually worked in the first and last week of employment.*** In
22   > such weeks, the payment of an hourly or daily equivalent of the
          > employee's full salary for the time actually worked will meet
23   > the requirement.

24   _____

    number of workdays or calendar days in each pay period.

25   [2] Salary basis and salary deductions are set forth in USDOL regulations at 29 C.F.R. §§ 541.602 and .603.
    Sections 541.602 ("Salary Basis") and .603 ("Effect of Improper Deductions from Salary"), which are in

26   Part 541- Salary Requirements; Subpart G - Defining and Delimiting the Exemptions for Executive,
    Administrative, Professional, Outside Sales and Computer Employees (eff. August 23, 2004).

27   [3] Section 541.602(b) sets forth seven exceptions to the prohibition on salary deductions due to variations in the
    quantity or quality of work performed.

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1   29 C.F.R. § 541.602(b)(6) (emphasis added).

2   The federal regulations go on to state that proportionality based on actual days missed

3   is acceptable. When "calculating the amount of a deduction from pay allowed under [29

4   C.F.R. § 541.602](b), the employer may use the hourly or daily equivalent of the employee's

5   full weekly salary *or any other amount proportional to the time actually missed by the*

6   *employee*." 29 C.F.R. § 541.602(c) (emphasis added).

7   The Washington state regulations allow for similar proration based on actual days

8   worked:

9   In the first and final week of employment, an employee's salary
           may be *prorated* for the actual days worked.

10 WAC 296-218-532(3)(e) (emphasis added).

11   In sum, neither the federal or state regulation restricts the employer to a mandatory or

12 standard formula for calculating a "proportionate part" or "prorated" deduction from salary.

13   Existing case law, which is sparse, simply cites 29 C.F.R. § 541.602(b)(6) for the

14 proposition that it is "entirely permissible under federal law" for "an employer not to pay a

15 salaried employee her full wages in her terminal week of employment." *Parmar v. Safeway,*

16 *Inc.*, 2011 WL 888238 at p. 5 (W.D. Wash. March 14, 2011). Courts also take note of

17 29 C.F.R. § 541.603(e), which states that, when it comes to deductions from salary, nothing in

18 the regulations regarding improper deductions is "to be construed in an unduly technical

19 manner so as to defeat the exemption." *Matthews v. Bronger Masonry, Inc.*, 2011

20 WL 693625 at p. 7 (S.D. Indiana, February 18, 2011).

21   Similarly, the Washington Department of Labor and Industries' guidance regarding

22 state law does nothing more than parrot the salary deduction regulation.

23   Q.   May an employer prorate the salary for the first and final
             weeks of employment?

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25   A.   Yes. The salary can be prorated for the actual days
             worked in the first and final weeks of employment.

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ES.A.9.1 Salary Basis Q&A, question No. 19 at p. 5 (rev'd 6/24/05). See Ex. 12 to Killeen Decl. ¶ 5.

To summarize:

- There is no set formula for prorating or calculating "proportionate" deductions.

- The employer has discretion to deduct a "proportionate part" of salary for actual day missed in the first and last week of employment under federal law and can prorate an employee's salary for actual days worked in the first and final week of employment under Washington law.

- "Proportionate" can be a daily equivalent or "any other amount proportional to the time actually missed by the employee."

- The regulations regarding improper deductions are <u>not</u> "to be construed in an unduly technical manner so as to defeat the exemption [by finding lack of salary basis]."

KIRCHOFF'S FIRST PAY PERIOD

Kirchoff's first day of work was July 26, 2010. Ex. 2 (Answer to Interrogatory No. 6) to Killeen Decl. ¶ 2(b). There were 11 workdays during the semi-monthly pay period of July 16 – 31, 2010. Kirchoff worked 5 of those days. Nagaraju Decl. ¶ 5. To prorate his salary, Wipro divided his semi-monthly salary of $5,833.50 by 11 workdays to determine that Kirchoff's prorated salary was $530.32 per day. *Id.* at ¶ 6. Wipro then multiplied the $530.32/day by the 5 days that Kirchoff actually worked and paid him $2,651.00, which is 5/11ths of his salary for his first pay period. *Id.* Kirchoff does not dispute that he was paid this amount, but, claims it should be $41.30 more.[4] Ex. 3 to Killeen Decl. ¶ 5.

KIRCHOFF'S LAST PAY PERIOD

Kirchoff's last day of work was January 27, 2011. Ex. 4 (Answers to Interrogatory Nos. 8 and 9) Ex. 10 and Ex. 11 to Killeen Decl. ¶¶ 2(d), 5, 6, and 7. There were 11

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[4] There appears to be small rounding differences of a dollar or less in some of the calculations. Wipro bases its motion on the amounts that Kirchoff admits he was paid and the additional amounts he claims he should have received.

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workdays in the semi-monthly pay period of January 16 – 31, 2011. Kirchoff worked 9 of those days. Nagaraju Decl. ¶ 9. To prorate his salary, Wipro divided Kirchoff's semi-monthly salary of $5,833.50 by 11 workdays to determine that Kirchoff's prorated salary was $530.32 per day. *Id.* at ¶ 10. Wipro then multiplied $530.32/day by the 9 days that Kirchoff actually worked and paid him $4,773.00, which is 9/11ths of his salary for his last pay period. *Id.* Kirchoff does not dispute that he was paid this amount, but, claims it should be $73.14 more. Ex. 4 to Killeen Decl. ¶ 2(d).

WIPRO'S FORMULA COMPLIES WITH THE SALARY BASIS REGULATIONS

The federal and state "salary basis" regulations, 29 C.F.R. §§ 541.602 and .603; WAC 296-128-532(2), expressly allow the use of a daily equivalent of an employee's salary when making prorata or "proportionate" deductions under the regulations. Wipro calculated Kirchoff's prorated salary for the first and final weeks of his employment using a workday method based on the proportionate number of workdays that Kirchoff actually worked and actually missed in a particular semi-monthly pay period. This workday method is not only allowed, but encouraged, by federal regulations. And, since Washington courts are guided by federal authority where the state MWA is consistent with the federal FLSA, Wipro's method and formula also satisfy the state law proration requirement. *Drinkwitz v. Alliant Techsystems Inc.*, 140 Wn.2d 291, 298 (2000) ("Because the MWA is based upon the FLSA, federal authority under the FLSA often provides helpful guidance.").

Wipro's formula of dividing Kirchoff's semi-monthly salary by the number of workdays in the pay period results in a proportionate daily salary specific to the particular semi-monthly pay period involved. Of course, the proportionate daily amount will vary (slightly) depending on the particular pay period involved because, although the numerator (the employee's semi-monthly salary) remains constant, the denominator changes depending on whether there are nine, ten, eleven or more workdays in the specific pay period.[5] As a

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[5] Over the course of the year, the prorated *daily* rate will be greater in some pay periods and lesser in some pay periods.

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result, Wipro's pay period formula, using the workday method, precisely tailors the prorated daily rate to the particular semi-monthly pay period involved, not some hypothetical or average pay period.

For example, if Kirchoff had started work on Monday, August 9, 2010 -- two weeks later than his actual starting date of Monday, July 26, 2010 -- his prorated salary per day for the semi-monthly pay period of August 1 – 15, 2010 would have been $583.00 per day (rather than $530.32 per day) -- an increase of nearly $53.00 per day. The reason his prorated daily salary would have been 10% larger for that pay period is because there were only ten workdays in that particular semi-monthly pay period as opposed to 11 workdays in the July 15-31, 2010 pay period. Thus, his prorated salary for the August pay period would have been 5/10ths (rather than 5/11ths) of his semi-monthly salary and he would have received $2,916.00 in prorated salary rather than $2,651.00.

**KIRCHOFF'S PREFERENCE FOR
OVERTIME COMPENSATION REGULATIONS**

Kirchoff argues in his Complaint that Wipro is required to prorate his salary using the overtime pay formula in 29 C.F.R. § 778.113(b), which allows employers to construct a fictional weekly salary so as to perform overtime pay calculations for a non-exempt employee.[6] Complaint at ¶¶ 9, 25.

To obtain a fictional weekly salary, Kirchoff multiplied his semi-monthly salary of $5,833.50 by 24 pay periods to annualize his salary as $140,000.[7] He then divided the annualized salary by 52 weeks to obtain a weekly average salary of $2,692. He divided the fictional weekly salary by 5 workdays, which is the average workweek, to generate an average daily salary of $538.46. He then compares this to Wipro's formula that prorated his salary as $530.32 per day and demands the difference of $8.14/day for 5 workdays, which he

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[6] Section 778.113 ("salaried employees - general") is in Part 778 – Overtime Compensation; Subpart B - The Overtime Pay Requirements - Principles for Computing Overtime Pay Based on the "Regular Rate."
[7] Kirchoff, of course, only worked six months.

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1   calculates as \$41.30 for his first pay period and \$73.14 for his last pay period.[8]   Ex. 3 to

2   Killeen Decl. ¶ 5.

3   While Kirchoff is entitled to argue that the formula used to create a fictional weekly

4   salary for overtime pay purposes has features that can be borrowed to calculate a prorated

5   daily salary, it is incorrect to argue, as he does, that this formula is a mandatory or exclusive

6   formula for calculating proportionate deductions from the predetermined salary under the

7   "salary basis" regulations.

8   29 C.F.R. § 778.113(b) governs overtime pay calculations, not prorating salary for

9   purposes of the deduction exception in 29 C.F.R. § 541.602(b)(6), which is at issue here. Yet,

10   even 29 C.F.R. § 778.113(b) allows for more than one formula for translating salary to an

11   average hourly rate to calculate overtime pay.

12   29 C.F.R. § 778.113(b), states, that, if salary is paid other than in weekly amounts (for

13   example, semi-monthly salary as in the case of Wipro), averaging formulas such as dividing

14   the number of workdays in a pay period into the salary is acceptable. 29 C.F.R. § 778.113(b).

15   That formulation is similar to what Wipro did in the case of Kirchoff.

16   These alternative methods applicable to overtime pay calculations for purposes of

17   29 C.F.R. § 778.113(b) are set forth at 29 C.F.R. § 548.3. Subsections (a) and (b) provide

18   "basic rate" formulas that are USDOL-approved. Subsection (a) states that employees who

19   are paid a monthly or semi-monthly salary can calculate their average basic rate using "a rate

20   per hour . . . obtained by dividing a monthly or semi-monthly salary by the number of

21   working days in each monthly or semi-monthly period" and then by the number of hours in a

22   normal workday. 29 C.F.R. § 548.3(a). Likewise, subsection (b) states that the average hourly

23   earnings for an employee who receives a specific pay for a period of one to 16 days, can have

24   a daily rate calculated by a formula that divides the amount of pay by the number of workdays

25   in the pay period, which, in turn, can be used to calculate average hourly rates for overtime

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[8] Kirchoff conveniently ignores that had he started work in a semi-monthly pay period that had 10 working days, rather than 11 working days, his prorated daily salary would have been greater than the average daily salary under his formula - \$583 per day (Wipro's formula) versus \$538.46 per day (Kirchoff's formula).

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1   pay purposes. 29 C.F.R. § 548.3(b). These formulas are further explained in 29 C.F.R.

2   §§ 548.301("Salaried employees") and .302 ("Averaging earnings for period other than a

3   workweek").

4   The bottom line is that 29 C.F.R. § 778.113(b) is neither a formula related to or

5   incorporated in Part 541 (Salary Requirements) with respect to proportionate salary at issue

6   under 29 C.F.R. § 541.602(b)(6). In fact, it is not even the exclusive formula within Part 778

7   (Overtime Compensation). It is nothing more than the "ordinary" formula in Part 778 used to

8   translate salary to an average hourly "regular rate" for overtime pay purposes. Thus, 29

9   C.F.R. § 778.113(b) neither governs salary basis or the calculation of a "proportionate part" of

10 salary for deduction purposes under 29 C.F.R. § 541.602(b)(6). And, it even allows for

11 alternative formulas authorized by USDOL for computing the average "basic rate" for

12 overtime pay purposes in the case of monthly or semi-monthly salary arrangements. Thus,

13 even if 29 C.F.R. § 778.113(b) were applicable – which it is not, it authorizes a formula that is

14 consistent with the one that Wipro actually used to achieve a proportionate result based on the

15 number of workdays in the pay period.

BONA FIDE DISPUTE

17   Kirchoff's third claim is that Wipro's allegedly improper formula for prorating his

18 salary constitutes a willful withholding of wages under the Wage Rebate Act (WRA), RCW

19 49.52.050(2) and RCW 49.52.070. However, RCW 49.52.050(2) and .070 do not apply if

20 there is a bona fide dispute regarding the alleged underpayment of wages. Willful

21 withholding is "the result of knowing an intentional action and not the result of a bona fide

22 dispute as to the obligation of payment." *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d

23 841, 849, 50 P.3d 256 (2002). A bona fide dispute sufficient to preclude a finding of

24 "willfulness" under the WRA is a "'fairly debatable' dispute over . . . whether all or a portion

25 of the wages must be paid." *Shilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d

26 371 (1998). Where there is no dispute as to the material facts, the court may resolve the issue

27 on summary judgment. *Schilling*, 136 Wn.2d at 160. *See also Ebling v. Gove's Cove, Inc.*, 34

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Wn. App. 495, 500, 663 P.3d 132 (1983) ("An employer's genuine belief that he is not

obligated to served wages preclude the withholding of wages from falling within the operation

of [the WRA].")

Here, there is, at the very least, a bona fide dispute as to whether Wipro's formula for

prorating salary complies with the federal and state regulations. Accordingly, Kirchoff's

claim under RCW 49.52.050(2) and .070 should be dismissed as a matter of law.

CONCLUSION

There are no material disputed facts regarding the workday method and formula that

Wipro to prorate Kirchoff's semi-monthly salary for his first week and final week of

employment. Wipro's formula is permitted under the federal and state regulations pertaining

to salary deductions. Accordingly, Kirchoff fails to state a claim and has suffered no damage.

The Court should, and it is requested to, enter summary judgment dismissing all of Kirchoff's

claims.

Respectfully submitted this 23rd day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2012, I electronically filed the foregoing with the

Clerk of the Court using the CM/ECF system which will send notification of such filing to the

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